

IC 24-5

ARTICLE 5. CONSUMER SALES

IC 24-5-0.5

Chapter 0.5. Deceptive Consumer Sales

IC 24-5-0.5-1

Construction and purposes

Sec. 1. (a) This chapter shall be liberally construed and applied to promote its purposes and policies.

(b) The purposes and policies of this chapter are to:

- (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices;
- (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts;
- (3) encourage the development of fair consumer sales practices.

(Formerly: Acts 1971, P.L.367, SEC.1.) As amended by P.L.18-1997, SEC.2.

IC 24-5-0.5-2

Definitions

Sec. 2. (a) As used in this chapter:

(1) "Consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible, except securities and policies or contracts of insurance issued by corporations authorized to transact an insurance business under the laws of the state of Indiana, with or without an extension of credit, to a person for purposes that are primarily personal, familial, charitable, agricultural, or household, or a solicitation to supply any of these things. However, the term includes a transfer of structured settlement payment rights under IC 34-50-2.

(2) "Person" means an individual, corporation, the state of Indiana or its subdivisions or agencies, business trust, estate, trust, partnership, association, nonprofit corporation or organization, or cooperative or any other legal entity.

(3) "Supplier" means:

(A) a seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including a manufacturer, wholesaler, or retailer, whether or not he deals directly with the consumer; or

(B) a person who contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes a pyramid promotional scheme.

(4) "Subject of a consumer transaction" means the personal property, real property services, or intangibles furnished in a consumer transaction.

(5) "Cure" as applied to a deceptive act, means either:

(A) to offer in writing to adjust or modify the consumer transaction to which the act relates to conform to the

reasonable expectations of the consumer generated by such deceptive act and to perform such offer if accepted by the consumer; or

(B) to offer in writing to rescind such consumer transaction and to perform such offer if accepted by the consumer.

(6) "Uncured deceptive act" means a deceptive act:

(A) with respect to which a consumer who has been damaged by such act has given notice to the supplier under section 5(a) of this chapter; and

(B) either:

(i) no offer to cure has been made to such consumer within thirty (30) days after such notice; or

(ii) the act has not been cured as to such consumer within a reasonable time after his acceptance of the offer to cure.

(7) "Incurable deceptive act" means a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead. The term includes a failure of a transferee of structured settlement payment rights to timely provide a true and complete disclosure statement to a payee as provided under IC 34-50-2 in connection with a direct or indirect transfer of structured settlement payment rights.

(8) "Pyramid promotional scheme" means any program utilizing a pyramid or chain process by which a participant in the program gives a valuable consideration exceeding one hundred dollars (\$100) for the opportunity or right to receive compensation or other things of value in return for inducing other persons to become participants for the purpose of gaining new participants in the program. The term does not include ordinary sales of goods or services to persons who are not purchasing in order to participate in such a scheme.

(9) "Promoting a pyramid promotional scheme" means:

(A) inducing or attempting to induce one (1) or more other persons to become participants in a pyramid promotional scheme; or

(B) assisting another in promoting a pyramid promotional scheme.

(10) "Elderly person" means an individual who is at least sixty-five (65) years of age.

(b) As used in section 3(a)(15) of this chapter:

(1) "Directory assistance" means the disclosure of telephone number information in connection with an identified telephone service subscriber by means of a live operator or automated service.

(2) "Local telephone directory" refers to a telephone classified advertising directory or the business section of a telephone directory that is distributed by a telephone company or directory publisher to subscribers located in the local exchanges contained in the directory. The term includes a directory that includes listings of more than one (1) telephone company.

(3) "Local telephone number" refers to a telephone number that has the three (3) number prefix used by the provider of telephone

service for telephones physically located within the area covered by the local telephone directory in which the number is listed. The term does not include long distance numbers or 800-, 888-, or 900- exchange numbers listed in a local telephone directory.

(Formerly: Acts 1971, P.L.367, SEC.1.) As amended by Acts 1982, P.L.152, SEC.1; P.L.12-1986, SEC.4; P.L.24-1989, SEC.10; P.L.233-1995, SEC.1; P.L.174-1997, SEC.1; P.L.18-1997, SEC.3; P.L.219-2001, SEC.1.

IC 24-5-0.5-3

Acts constituting deceptive practices

Sec. 3. (a) The following acts or representations as to the subject matter of a consumer transaction, made either orally or in writing by a supplier, are deceptive acts:

- (1) That such subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have.
- (2) That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.
- (3) That such subject of a consumer transaction is new or unused, if it is not and if the supplier knows or should reasonably know that it is not.
- (4) That such subject of a consumer transaction will be supplied to the public in greater quantity than the supplier intends or reasonably expects.
- (5) That replacement or repair constituting the subject of a consumer transaction is needed, if it is not and if the supplier knows or should reasonably know that it is not.
- (6) That a specific price advantage exists as to such subject of a consumer transaction, if it does not and if the supplier knows or should reasonably know that it does not.
- (7) That the supplier has a sponsorship, approval, or affiliation in such consumer transaction he does not have, and which the supplier knows or should reasonably know that he does not have.
- (8) That such consumer transaction involves or does not involve a warranty, a disclaimer of warranties, or other rights, remedies, or obligations, if the representation is false and if the supplier knows or should reasonably know that the representation is false.
- (9) That the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a sale or lease in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit, rebate, or discount is contingent upon the occurrence of an event subsequent to the time the consumer agrees to the purchase or lease.
- (10) That the supplier is able to deliver or complete the subject of the consumer transaction within a stated period of time, when the supplier knows or should reasonably know he could not. If no time period has been stated by the supplier, there is a presumption

that the supplier has represented that he will deliver or complete the subject of the consumer transaction within a reasonable time, according to the course of dealing or the usage of the trade.

(11) That the consumer will be able to purchase the subject of the consumer transaction as advertised by the supplier, if the supplier does not intend to sell it.

(12) That the replacement or repair constituting the subject of a consumer transaction can be made by the supplier for the estimate the supplier gives a customer for the replacement or repair, if the specified work is completed and:

(A) the cost exceeds the estimate by an amount equal to or greater than ten percent (10%) of the estimate;

(B) the supplier did not obtain written permission from the customer to authorize the supplier to complete the work even if the cost would exceed the amounts specified in clause (A);

(C) the total cost for services and parts for a single transaction is more than seven hundred fifty dollars (\$750); and

(D) the supplier knew or reasonably should have known that the cost would exceed the estimate in the amounts specified in clause (A).

(13) That the replacement or repair constituting the subject of a consumer transaction is needed, and that the supplier disposes of the part repaired or replaced earlier than seventy-two (72) hours after both:

(A) the customer has been notified that the work has been completed; and

(B) the part repaired or replaced has been made available for examination upon the request of the customer.

(14) Engaging in the replacement or repair of the subject of a consumer transaction if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized.

(15) The act of misrepresenting the geographic location of the supplier by listing a fictitious business name or an assumed business name (as described in IC 23-15-1) in a local telephone directory if:

(A) the name misrepresents the supplier's geographic location;

(B) the listing fails to identify the locality and state of the supplier's business;

(C) calls to the local telephone number are routinely forwarded or otherwise transferred to a supplier's business location that is outside the calling area covered by the local telephone directory; and

(D) the supplier's business location is located in a county that is not contiguous to a county in the calling area covered by the local telephone directory.

(16) The act of listing a fictitious business name or assumed business name (as described in IC 23-15-1) in a directory assistance database if:

(A) the name misrepresents the supplier's geographic location;

(B) calls to the local telephone number are routinely forwarded

or otherwise transferred to a supplier's business location that is outside the local calling area; and

(C) the supplier's business location is located in a county that is not contiguous to a county in the local calling area.

(17) That the supplier violated IC 24-3-4 concerning cigarettes for import or export.

(18) That a supplier knowingly sells or resells a product to a consumer if the product has been recalled, whether by the order of a court or a regulatory body, or voluntarily by the manufacturer, distributor, or retailer unless the product has been repaired or modified to correct the defect that was the subject of the recall.

(b) Any representations on or within a product or its packaging or in advertising or promotional materials which would constitute a deceptive act shall be the deceptive act both of the supplier who places such representation thereon or therein, or who authored such materials, and such other suppliers who shall state orally or in writing that such representation is true if such other supplier shall know or have reason to know that such representation was false.

(c) If a supplier shows by a preponderance of the evidence that an act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, such act shall not be deceptive within the meaning of this chapter.

(d) It shall be a defense to any action brought under this chapter that the representation constituting an alleged deceptive act was one made in good faith by the supplier without knowledge of its falsity and in reliance upon the oral or written representations of the manufacturer, the person from whom the supplier acquired the product, any testing organization, or any other person provided that the source thereof is disclosed to the consumer.

(e) For purposes of subsection (a)(12), a supplier that provides estimates before performing repair or replacement work for a customer shall give the customer a written estimate itemizing as closely as possible the price for labor and parts necessary for the specific job before commencing the work.

(f) For purposes of subsection (a)(15), a telephone company or other provider of a telephone directory or directory assistance service or its officer or agent is immune from liability for publishing the listing of a fictitious business name or assumed business name of a supplier in its directory or directory assistance database unless the telephone company or other provider of a telephone directory or directory assistance service is the same person as the supplier who has committed the deceptive act.

(g) For purposes of subsection (a)(18), it is an affirmative defense to any action brought under this chapter that the product has been altered by a person other than the defendant to render the product completely incapable of serving its original purpose.

(Formerly: Acts 1971, P.L.367, SEC.1.) As amended by Acts 1978, P.L.127, SEC.2; Acts 1982, P.L.153, SEC.1; Acts 1982, P.L.152, SEC.2; P.L.16-1983, SEC.16; P.L.239-1985, SEC.1; P.L.12-1986, SEC.5; P.L.24-1989, SEC.11; P.L.174-1997, SEC.2; P.L.21-2000,

IC 24-5-0.5-4

Actions and proceedings; damages; injunction; civil penalties

Sec. 4. (a) A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act. The court may award reasonable attorney fees to the party that prevails in an action under this subsection. This subsection does not apply to a consumer transaction in real property, except for purchases of time shares and camping club memberships. Actual damages awarded to a person under this section have priority over any civil penalty imposed under this chapter.

(b) Any person who is entitled to bring an action under subsection (a) on the person's own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member and which has been damaged by such deceptive act, subject to and under the Indiana Rules of Trial Procedure governing class actions, except as herein expressly provided. The court may award reasonable attorney fees to the party that prevails in a class action under this subsection, provided that such fee shall be determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although the contingency of the fee may be considered. Any money or other property recovered in a class action under this subsection which cannot, with due diligence, be restored to consumers within one (1) year after the judgment becomes final shall be returned to the party depositing the same. This subsection does not apply to a consumer transaction in real property, except for purchases of time shares and camping club memberships. Actual damages awarded to a class have priority over any civil penalty imposed under this chapter.

(c) The attorney general may bring an action to enjoin a deceptive act. However, the attorney general may seek to enjoin patterns of incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may:

- (1) issue an injunction;
- (2) order the supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers; and
- (3) order the supplier to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action.

(d) In an action under subsection (a), (b), or (c), the court may void or limit the application of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers.

(e) In any action under subsection (a) or (b), upon the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, the trial court, the supreme court, or the court of appeals may require the plaintiff, defendant, claimant, or any other party or parties to give security, or additional security, in such sum as the court shall direct to pay all costs, expenses, and

disbursements that shall be awarded against that party or which that party may be directed to pay by any interlocutory order by the final judgment or on appeal.

(f) Any person who violates the terms of an injunction issued under subsection (c) shall forfeit and pay to the state a civil penalty of not more than fifteen thousand dollars (\$15,000) per violation. For the purposes of this section, the court issuing an injunction shall retain jurisdiction, the cause shall be continued, and the attorney general acting in the name of the state may petition for recovery of civil penalties. Whenever the court determines that an injunction issued under subsection (c) has been violated, the court shall award reasonable costs to the state.

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, the attorney general, in an action pursuant to subsection (c), may recover from the person on behalf of the state a civil penalty of a fine not exceeding five hundred dollars (\$500) per violation.

(h) An elderly person relying upon an uncured or incurable deceptive act, including an act related to hypnotism, may bring an action to recover treble damages, if appropriate.

(Formerly: Acts 1971, P.L.367, SEC.1.) As amended by Acts 1978, P.L.127, SEC.3; Acts 1982, P.L.152, SEC.3; P.L.12-1986, SEC.6; P.L.3-1989, SEC.141; P.L.24-1989, SEC.12; P.L.233-1995, SEC.2.

IC 24-5-0.5-5

Limitation of actions

Sec. 5. (a) No action may be brought under this chapter, except under section 4(c) of this chapter, unless (1) the deceptive act is incurable or (2) the consumer bringing the action shall have given notice in writing to the supplier within the sooner of (i) six (6) months after the initial discovery of the deceptive act, (ii) one (1) year following such consumer transaction, or (iii) any time limitation, not less than thirty (30) days, of any period of warranty applicable to the transaction, which notice shall state fully the nature of the alleged deceptive act and the actual damage suffered therefrom, and unless such deceptive act shall have become an uncured deceptive act.

(b) No action may be brought under this chapter except as expressly authorized in section 4(a), 4(b), or 4(c) of this chapter. Any action brought under this chapter may not be brought more than two (2) years after the occurrence of the deceptive act.

(Formerly: Acts 1971, P.L.367, SEC.1.) As amended by Acts 1982, P.L.152, SEC.4; P.L.211-1993, SEC.1; P.L.45-1995, SEC.17.

IC 24-5-0.5-6

Application of law

Sec. 6. (Application) This chapter does not apply to an act or practice (1) required or expressly permitted by federal law, rule or regulation, or (2) required or expressly permitted by state law, rule, regulation or local ordinance.

(Formerly: Acts 1971, P.L.367, SEC.1.)

IC 24-5-0.5-7

Assurances of voluntary compliance

Sec. 7. (a) In the administration of this chapter, the attorney general may accept an assurance of voluntary compliance with respect to any deceptive act from any person who has engaged in, is engaging in, or is about to engage in such deceptive act. The assurance of voluntary compliance may include a stipulation for the voluntary payment by the person of the costs of investigation or payment of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved consumers, or both. The assurance of voluntary compliance shall be in writing and shall be filed with and subject to the approval of the court having jurisdiction.

(b) The assurance of voluntary compliance shall not be considered an admission of a deceptive act for any purpose; however, any violation of the terms of the assurance constitutes prima facie evidence of a deceptive act. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest.

As added by Acts 1978, P.L.127, SEC.4.

IC 24-5-0.5-8

Incurable deceptive act; civil penalty

Sec. 8. A person who commits an incurable deceptive act is subject to a civil penalty of a fine of not more than five hundred dollars (\$500) for each violation. The attorney general, acting in the name of the state, has the exclusive right to petition for recovery of such a fine, and this fine may be recovered only in an action brought under section 4(c) of this chapter.

As added by Acts 1978, P.L.127, SEC.5. Amended by Acts 1982, P.L.152, SEC.5.

IC 24-5-0.5-9

Cooperative purchase supplier contracts; maximum duration; civil penalty

Sec. 9. A supplier which is organized primarily to provide benefits to persons from the cooperative purchase of the subject of a consumer transaction shall not offer a contract for that purpose that is to be effective for more than five (5) years. A supplier that violates this section is subject to a civil penalty of a fine of not more than five hundred dollars (\$500) for each violation. The attorney general, acting in the name of the state, has the exclusive right to petition for recovery of such a fine, and this fine may be recovered only in an action brought under section 4(c) of this chapter.

As added by Acts 1978, P.L.127, SEC.6. Amended by Acts 1982, P.L.152, SEC.6.

IC 24-5-0.5-10

Suppliers; deceptive and unconscionable acts

Sec. 10. (a) A supplier commits a deceptive act if the supplier gives any of the following representations, orally or in writing, or does any of the following acts:

(1) Either:

(A) solicits to engage in a consumer transaction without a permit

or other license required by law;

(B) solicits to engage in a consumer transaction if a permit or other license is required by law to engage in the consumer transaction and the supplier is not qualified to obtain the required permit or other license or does not intend to obtain the permit or other license; or

(C) engages in a consumer transaction without a permit or other license required by law.

(2) Commits a violation of IC 24-5-10.

(3) Contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes a pyramid promotional scheme.

(b) A supplier commits an unconscionable act that shall be treated the same as a deceptive act under this chapter if the supplier solicits a person to enter into a contract or agreement:

(1) that contains terms that are oppressively one sided or harsh;

(2) in which the terms unduly limit the person's remedies; or

(3) in which the price is unduly excessive;

and there was unequal bargaining power that led the person to enter into the contract or agreement unwillingly or without knowledge of the terms of the contract or agreement. There is a rebuttable presumption that a person has knowledge of the terms of a contract or agreement if the person signs a written contract.

As added by P.L.12-1986, SEC.7. Amended by P.L.251-1987, SEC.1; P.L.18-1997, SEC.4.

IC 24-5-0.5-12

False claim of doctoral degree

Sec. 12. (a) It is an incurable deceptive act for an individual, while soliciting or performing a consumer transaction, to claim, either orally or in writing, to possess a doctorate degree or use a title, a word, letters, an insignia, or an abbreviation associated with a doctorate degree, unless the individual:

(1) has been awarded a doctorate degree from an institution that is:

(A) accredited by a regional or professional accrediting agency recognized by the United States Department of Education or the Council on Postsecondary Accreditation;

(B) a religious seminary, institute, college, or university whose certificates, diplomas, or degrees clearly identify the religious character of the educational program; or

(C) operated and supported by a governmental agency; or

(2) meets the requirements approved by one (1) of the following boards:

(A) Medical licensing board of Indiana.

(B) State board of dental examiners.

(C) Indiana optometry board.

(D) Board of podiatric medicine.

(E) State psychology board.

(F) Board of chiropractic examiners.

(G) Indiana board of veterinary medical examiners.

(H) Indiana board of pharmacy.

(I) Indiana state board of nursing.

(b) It is an incurable deceptive act for an individual, while soliciting or performing a consumer transaction, to claim to be a:

- (1) physician unless the individual holds an unlimited license to practice medicine under IC 25-22.5;
- (2) chiropractic physician unless the individual holds a license as a chiropractor under IC 25-10-1; or
- (3) podiatric physician unless the individual holds a license as a podiatrist under IC 25-29.

(c) The attorney general shall enforce this section in the same manner as any other incurable deceptive act under this chapter.

As added by P.L.175-1997, SEC.1. Amended by P.L.246-1999, SEC.1; P.L.12-2000, SEC.1.